

Determinations regarding nexus are very fact specific and cannot be addressed in the context of a General Information Letter. See 86 Ill. Adm. Code 495.110. (This is a GIL).

July 17, 2000

Dear Xxxxx:

This letter is in response to your letter dated May 11, 2000. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120 subsections (b) and (c), which can be found at <http://www.revenue.state.il.us/legalinformation/regs/part1200>.

In your letter, you have stated and made inquiry as follows:

I am an attorney that works for a telecommunications tax consulting and software company. A client of ours has a question that deals with the imposition of the Illinois Telecommunications Excise Tax and any other utility taxes that may be applicable to teleconferencing services. I would greatly appreciate a General Information Letter and/or advisory opinion regarding the taxability of teleconferencing services in light of the following facts:

FACTS:

Our client is in the business of providing telephone conferencing services. The teleconferencing service allows people in various parts of the country to take part in a telephone conference call. This service is accomplished primarily via proprietary software and hardware which our client has developed.

A typical conference transaction works as follows. A customer will call one of our client's operators who obtains the necessary information for the call including the number of parties to be included in the call, their names, telephone numbers, etc. At the time selected for the conference, the operator calls each of the parties and connects them to the conference call. Another option allows conferees to call a central number and be connected to the conference call automatically.

In order to provide the conferencing service, our client purchases long distance telephone service from a long distance telecommunication services provider such as ATT.

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Our client is not a regulated telephone company nor does it own any telephone facilities. All customers contact the client's offices in another state ('State A') to reserve usage of the service. All calls originate and terminate in State A. Our client does not own or lease property in Illinois and does not have any employees or agents in Illinois. Our client does bill charges to customers who have addresses within Illinois, but does not directly solicit business in Illinois. All of our client's business is derived through referrals or through advertisements in national magazines and industry periodicals.

Question:

Do our clients have nexus in Illinois for purposes of the Telecommunications Excise Tax and any other utility tax statutes?.

I would greatly appreciate a written response to the above queries as soon as practically possible.

Please do not hesitate call me if you have any questions, or need any clarification with regards to the above.

Determinations regarding nexus are very fact specific and cannot be addressed in the context of a General Information Letter. However, we can provide you with basic guidelines that may be used to determine whether your client would be considered a retailer maintaining a place of business in this State subject to a tax collection obligation from its Illinois customers.

The Telecommunications Excise Tax Act imposes a tax upon the act or privilege of originating or receiving intrastate or interstate telecommunications in Illinois at the rate of 7% of the gross charges for such telecommunications purchased at retail from retailers. Please see the enclosed copy of 86 Ill. Adm. Code Part 495. This tax must be collected from persons by retailers maintaining a place of business in Illinois and is then remitted directly to the Department by such retailers. See Section 495.110.

Section 2(m) of the Telecommunications Excise Tax Act states that a "retailer maintaining a place of business in this State" includes any retailer having or maintaining within Illinois, directly or by a subsidiary, an office, distribution facilities, transmission facilities, sales office, warehouse or other place of business, or any agent or other representative operating within Illinois under the authority of the retailer or its subsidiary, irrespective of whether such place of business or agent or other representative is located here permanently or temporarily, or whether such retailer or subsidiary is licensed to do business in this State. See, 35 ILCS 630/2(m).

These provisions are subject to the U.S. Supreme Court ruling in *Quill v. North Dakota*, 112 S.Ct. 1902 (1992), which set forth guidelines for determining what nexus requirements must be met before a business is properly subject to a

state's tax laws. *Quill* invoked a two-prong analysis consisting of (1) whether the Due Process Clause is satisfied and (2) whether the Commerce Clause "substantial nexus" test is met before the state can impose tax collection responsibilities.

The due process test will be met if requiring the retailer to collect state tax is fundamentally fair to the retailer. If the retailer intentionally avails itself of the benefits of the taxing state's economic market, then due process is satisfied. *Quill* at 1910.

Notwithstanding the fact that due process has been met, a business must also have a physical presence in the taxing state in order for the "substantial nexus" test to be met under the Commerce Clause and before a state can impose tax collection responsibilities on an out-of-State retailer. A physical presence does not require an office or other physical building. Under Illinois tax law, it also includes the presence of any representative or other agent of the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, even if temporary, will trigger tax collection responsibilities.

For your general information, we have also set out other Illinois taxes that may apply to your client's teleconferencing services. The Telecommunications Municipal Infrastructure Maintenance Fee Act (the Act) (35 ILCS 635/1 et seq.), effective January 1, 1998, provides for the imposition of various fees upon telecommunications retailers. Please note that this Act also defines "retailer maintaining a place of business in this State" in the same manner as the Telecommunications Excise Tax Act. See, 35 ILCS 635/10(e).

Section 15 of the Act imposes a State infrastructure maintenance fee upon telecommunications retailers, as that term is defined in 35 ILCS 635/10, "equal to 0.5% of all gross charges charged by the telecommunications retailer to service addresses in this State for telecommunications, other than wireless telecommunications, originating or received in this State." 35 ILCS 635/15(b). Section 15 also provides for an optional infrastructure maintenance fee which telecommunications retailers may pay "with respect to the gross charges charged by the telecommunications retailer to service addresses in a particular municipality for telecommunications, other than wireless telecommunications, originating or received in the municipality...." 35 ILCS 635/15(c). These fees are collected, enforced and administered by the Illinois Department of Revenue. 35 ILCS 635/25(b).

Section 20 of the Act provides that municipalities may impose a municipal infrastructure maintenance fee upon telecommunications retailers. This fee is based upon gross charges charged by the telecommunications retailers to service addresses in the municipality for telecommunications originating or received in the municipality. This fee is collected, enforced, and administered by the municipality imposing the fee. 35 ILCS 635/25(c).

Illinois municipalities are also authorized to impose a municipal telecommunications tax. See 65 ILCS 5/8-11-17. The tax is imposed on the act

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or privilege of originating in such municipality or receiving in such municipality intrastate or interstate telecommunications by a person at a rate not to exceed 5% of the gross charges for such telecommunications purchased at retail by such person. 65 ILCS 5/8-11-17(a)(1) and 5/8-11-17(a)(2). This tax may only be imposed if the municipality does not have in effect an occupation tax imposed on persons engaged in the business of transmitting messages by means of electricity as authorized by Section 8-11-2 (65 ILCS 5/8-11-2) of the Illinois Municipal Code. The municipality imposing the tax provides for its administration and enforcement, not the Illinois Department of Revenue. Therefore, questions regarding this tax should be addressed to the individual municipalities imposing it. There is no equivalent statute for county governments.

I hope this information is helpful. The Department of Revenue maintains a website, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of the enclosed copy of Section 1200.110(b).

Very truly yours,

Terry D. Charlton
Associate Counsel

TDC:msk
Enc.